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URS v BDW: Comment and practical implications for the building industry

11 June 2025 Tim Claremont

On Thursday 22 May 2025, the Supreme Court released its judgment in URS Corporation Ltd (Appellant) v BDW Trading Ltd (Respondent) [2025] UKSC 21.

The judgment was highly anticipated, since the issues raised included important points of principle regarding both the operation of the Building Safety Act 2022 (BSA) and when a cause of action in the tort of negligence accrues, with the result that a full panel of seven judges convened to hear the matter.

As many in the industry will know by now, the Supreme Court dismissed all four grounds of URS's appeal. There has already been a lot of comment in relation to the precise details of the judgment.

With that in mind, whilst we have briefly summarised the court's conclusions with regard to each ground, the main focus of this article is to consider the practical implications for those in the industry arising out of the judgment.

The judgment

By way of context, the respondent (BDW) is a major developer, with its brand names including the likes of Barratt Homes and David Wilson Homes. The appellant (URS) provides consultant engineering services.

In late 2019, BDW discovered design defects in two sets of multiple high-rise residential building developments for which it had been the developer and URS had provided structural design services. In 2020 and 2021, BDW carried out repairs/remedial works to those developments, although no claim against BDW arising out of the defects had been intimated by any third-party owner or occupier of the developments. It claimed the cost of those remedial works, together with associated costs, from URS.

It is important to note that the Supreme Court's decision (and the decisions at first instance and from the Court of Appeal) proceeded on a set of assumed facts.

These included:

- the existence and severity of defects at the property,
- that the defects existed a result of URS's failure to exercise reasonable skill and care in design,
- that this failure was a breach of URS's common law duty of care in tort (which was concurrent with, and arising out of, the obligations assumed by URS under its contracts with BDW) and
- also that the existence of certain of the defects presented a health and safety risk.

In other words, whilst the Supreme Court's decision will undoubtedly be helpful for BDW, and less so for URS, the decision does not in fact make URS liable for anything.

Ground 1: In relation to BDW's claim in the tort of negligence against URS, has BDW suffered actionable and recoverable damage or is the damage

outside the scope of the duty of care and/or too remote because it was voluntarily incurred (disregarding the possible impact of s.135 BSA)?

If the answer to that question is that the damage is outside the scope of the duty of care or is too remote, did BDW in any event already have an accrued cause of action in the tort of negligence at the time it sold the developments?

The Supreme Court held that it did not matter that BDW had voluntarily undertaken the remedial works (URS alleged that this made the repair costs irrecoverable as being outside of the duty of care or too remote). It considered that the four cases URS relied on did not establish a *"voluntariness principle"*, but that instead each case could be explained by other legal principles, being the recoverability of pure economic loss and legal causation and mitigation. It also considered, on the assumed facts, that it was strongly arguable that BDW had not performed the repairs voluntarily, in particular because of the risks of personal injury or death to the homeowners if it did not do so, for which BDW might be legally liable under the DPA or in contract (for breach of collateral warranties).

As a result, the second question of precisely when BDW's tortious cause of action accrued, and the correctness of the House of Lords' decision in Pirelli General Cable Works Ltd v Oscar Faber & Partners [1983] 2 AC 1 (Pirelli), did not arise. The Supreme Court said that it would be inappropriate for it to overrule Pirelli on the basis that anything it said would be obiter dicta (i.e., not binding as a matter of precedent) (See the 1966 Practice Statement, [1966] 1 WLR 1234).

Ground 2: Does s.135 of the BSA apply in the present circumstances and, if so, what is its effect?

The parties agreed that section 135 applies to a claim brought under section 1 of the Defective Premises Act (DPA). However, what was in dispute was whether the retrospectivity of section 135 also applies to claims which are dependent on the time limit under the DPA but are not actually claims brought under DPA.

The Supreme Court confirmed that s.135 of the BSA applies to claims under the DPA and those *"which are dependent"* on s.1 of the DPA. It held that this conclusion is supported by the words, context and purpose of the statutory provision.

Notably, counsel for URS conceded in oral argument that the DPA applied to contribution claims brought after the commencement date in the BSA. Relying on this concession, the Supreme Court noted that there was *"no good reason to confine that to contribution claims. A claim in the tort of negligence for damages dependent on there being a liability under section 1 of the DPA is equally "indirectly based" on a DPA action"* (Paragraph 113).

Ground 3: Did URS owe a duty to BDW under s.1(1)(a) DPA and, if so, are BDW's alleged losses of a type which are recoverable for breach of that duty?

The Supreme Court confirmed that URS owed a duty to BDW under the DPA – there is no reason why a developer cannot both owe a duty and be a owed a duty under that Act, most obviously where the developer who orders relevant work is the first owner.

It held that the purpose of the s.1 DPA duty was to protect the interests of those who:

1. acquire an interest in the dwelling; and
2. have an interest in the dwelling other than by acquisition or purchase, most obviously the first owner, noting that construction law textbooks support this interpretation.

There was also no question of the repair costs being of a type that are irrecoverable for breach of that duty.

Ground 4: Is BDW entitled to bring a claim against URS under section 1 of the Contribution Act when there has been no judgment or settlement between BDW and any third party and no third party has ever asserted any claim against BDW?

The Supreme Court confirmed that BDW was entitled to seek to recover sums from URS, notwithstanding that no formal claims had been made against BDW. The correct interpretation is that the right to contribution arises when:

1. damage has been suffered by a claimant for which Defendant 1 (D1) and Defendant 2 (D2) are each liable; and
2. D1 has paid or been ordered or agreed to pay compensation for the damage to the claimant.

At that point, but not before, D1 is entitled to recover contribution from D2.

It was sufficient that BDW had made a payment in kind by carrying out the repairs. The fact that there had been no judgment against BDW or admission of liability or settlement between BDW and any of the homeowners, nor even any claim against BDW, did not prevent BDW from claiming a contribution from URS.

Comment

Policy element to the decision

The judgment includes a large element of policy. It is notable not only that the Secretary of State for Housing, Communities and Local Government acted as an Intervener, making written submissions, but also that the Supreme Court described those submissions as *"particularly helpful in relation to the background to the BSA, the structure of the BSA and the policy and purpose underlying the BSA in general and section 135 in particular"* (Paragraph 78).

In keeping with this, the Supreme Court commented with regard to Ground 2 that *"A central purpose and policy of the BSA in general, and section 135 in particular, was to hold those responsible for building safety defects accountable"* (Paragraph 104). In dismissing URS's appeal in this regard, the Court observed that URS's contention that the retrospectivity of section 135 did not apply to claims which were dependent on the time limit under the DPA but not actually brought under it would *"seriously undermine"* the purpose of the BSA.

Claims under the DPA and limitations on liability

One particularly important issue arising out of the judgment is that any limitation of liability clause (whether that is an exclusion or cap on liability, or e.g. a net contribution clause) will not be effective to the extent that the works in question are caught by the DPA. This is likely to be relevant to those in the industry, and those who insure them, both in the context of historic portfolios and future works for residential properties.

This arises out of Ground 3 of URS's appeal. In commenting on this issue, the Supreme Court noted that an *"important feature"* of s1(1) of the DPA is that it is impossible to contract out of it (Paragraph 199) and Section 6(3) of the DPA states: *"Any term of an agreement which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of any of the provisions of this Act, or any liability arising by virtue of any such provision, shall be void"*. Whilst the Court went on to note that s6(3) *"is a substantial interference with freedom of contract"* (Paragraph 200), and that this was one reason why URS submitted that developers should be excluded from the persons to whom that statutory duty is owed, it nevertheless held that URS did owe a duty to BDW under the DPA.

The importance of this element of the judgment should not be overlooked – in simple terms, and as set out above, in the event the DPA applies, then any limitation of liability clause will not be effective (to the extent that it applies to the work in question).

By way of further comment:

- S6(3) of the DPA has been in force for over 50 years and since the Grenfell tragedy in 2017 numerous claimants have relied on the DPA (indeed, the above issue has been the subject of previous comment).
- However, this decision removes any doubt about the extent to which s6(3) is enforceable and applicable and it therefore seems likely that claimants will from now on seek whenever possible to ensure that their claim against a contractor or consultant alleges not only that there is a breach of contract but also that the works in question were for or in connection with a dwelling and that the defects left it unfit for habitation. If those allegations succeed, they will bypass any limitation on liability in a contract, which of course has the potential to increase the exposure of those undertaking such work. Our initial view is that it is very unlikely there is any way to address this. Those holding insurance will therefore need to consider carefully if they have sufficient insurance in this regard, whilst insurers will doubtless wish to review the nature of their existing and future risk.
- The consequence of this is that there will likely be satellite litigation, both regarding (1) the extent to which the DPA applies to particular types of buildings (although the position is clear in some instances (e.g., a block of flats is a dwelling, whilst a typical office building is not), it is less clear in others, with questions arising regarding the extent to which e.g., student accommodation and care homes are caught by the DPA; and (2) what losses can be recovered under the DPA (most obviously loss of profit).

- Whilst we can also see that questions might arise regarding the extent to which any defective work has in fact meant that the dwelling is not *"fit for habitation when completed"* (as required by s1(1) of the DPA), case law suggests that the Courts will take a relatively wide approach view in that regard (See e.g., Rendlesham Estates plc v Barr Ltd [2014] EWHC 3968 (TCC) and Vainker and another v Marbank Construction Ltd and Others [2024] EWHC 667 (TCC).), indicating that in order for a dwelling to be fit for habitation within the meaning of the DPA:
  - it must, on completion, without any remedial works being carried out, be capable of occupation for a reasonable time without risk to the health or safety of the occupants and without undue inconvenience or discomfort to the occupants (e.g., a lift in a tower block that was poorly installed so that it frequently broke down could well make apartments on the higher floors unfit for habitation);
  - a defect which means that the condition of the dwelling is likely to deteriorate over time and render the dwelling unfit for habitation when it does so means that the dwelling can be said to be unfit for habitation at the time of completion;
  - the aggregate effect of defects can render a dwelling unfit for habitation at the date of completion, but it is unlikely that a defect that is only aesthetic or inconvenient would render a dwelling unfit for habitation; and
  - it is relevant that a dwelling is intended to be not only a new build but modern in design (this is a fact sensitive question in respect of any particular defect).

As a firm we have recent practical experience of some of the issues set out above in the context of court proceedings and would be very happy to discuss that with you if it would be helpful.

Duties under the DPA

The Supreme Court confirmed that there is no reason why a developer cannot both owe a duty and be owed a duty under s1(1) of the DPA, most obviously where the developer who orders relevant work is the first owner. It went on to comment that it was not only a developer who might both owe and be owed such a duty, referring to a builder who builds a house on its own land having instructed an architect – in that instance, the builder would both owe duties to subsequent purchasers and be owed a duty by the architect.

However, the decision leaves open the question in other scenarios, most obviously for main contractors – whilst they undoubtedly owe a duty to their employers, will they also be owed a duty by their subcontractors?

This will probably lead to further satellite litigation regarding the precise extent to which the subcontractor's work is for a dwelling *"provided to the order"* of the main contractor.

Pirelli/accrual of causes of action

Those of us hoping for a Supreme Court ruling addressing the issues caused by Pirelli were left disappointed (as, possibly, were the seven judges themselves given their conclusion that it would be inappropriate to overrule Pirelli with obiter dicta comments).

However, the Court did make three points on the topic, which are worth considering given that there are important issues outstanding with regard to the accrual of tortious causes of action (i.e., the date from which a limitation period starts to run):

1. Pirelli was decided on the false premise that cracks in a building constitute physical damage rather than pure economic loss for the purposes of the tort of negligence (this had already been made clear by Murphy v Brentwood).
2. However, that false premise did not necessarily mean that Pirelli was wrong in reasoning that the cause of action in the tort of negligence accrues when the relevant *"damage"* occurs (and not when that damage is discovered or could reasonably have been discovered, which the Supreme Court called the date of discoverability). This is because it's possible to have a concept of latent pure economic loss even though that loss could not at the time of accrual have been reasonably discovered. The Court noted that this is supported by case law (e.g., New Islington and Hackney Housing Association Ltd v Pollard Thomas and Edwards Ltd [2001] PNLR 20, and Forster v Outred & Co).
3. Despite the first two points above, the Supreme Court considered that in the context of pure economic loss there are strong arguments (supported by both case law and academic opinion) for accepting that there can only be an actual loss once the pure economic loss has been discovered or could reasonably have been discovered. However, this would conflict with the position set out in the Latent Damage Act 1986. The Latent Damage Act gives a claimant six years from accrual of the cause of action or three years from the date of discoverability, whichever expires later, to commence an action in the tort of negligence for damage including pure economic loss. This is subject to a longstop of 15 years running from the date of the negligent act or omission (i.e., the breach of duty). In contrast, the approach contemplated by the Supreme Court would give a claimant six years from the date of discoverability.

Unfortunately, if understandably, this leaves things in a slightly unsatisfactory position. Whilst it appears likely that the Supreme Court's comments will significantly limit the future application of Pirelli (which is undoubtedly helpful), the tension raised by the third point above

still needs resolving. The Court itself noted that resolving these difficult issues would need to await a case where its decision would be binding (rather than obiter) and where the court had had the benefit of full submissions on that question. However, there is no guarantee that such a case will in fact arise (or, if it does, that it will go to the Supreme Court) and we therefore hope that instead the Law Reform Committee will address this issue in the meantime (not least given the conflict the Supreme Court raised). Of course, there is no guarantee that this process will be quick either.

Statutory interpretation/ use of background material

Relying on its judgment in News Corp UK & Ireland Ltd v Revenue and Customs Comrs [2023] UKSC 7 the Supreme Court confirmed the modern approach to statutory interpretation requires the courts to ascertain the meaning of the words used in a statute in the light of their context and the purpose of the statutory provision.

In keeping with this, in its judgment on Grounds 2 and 3 the Supreme Court referred to Law Commission Reports, the Hackitt Report and the Explanatory Notes to the BSA – being in stark contrast to the approach taken by the Court of Appeal. See e.g. paragraph 183 of the Court of Appeal's judgment: *"Ms Parkin relied on the Law Commission Report, because that made a number of references to individual purchasers. It was not clear how or why the Report was even admissible, given that the words of the DPA itself were free from ambiguity."*

This guidance will assist practitioners when advising on the interpretation of statutes generally (the News Corp judgment related to whether the zero VAT rating for print newspapers also applied to digital editions).

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